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**M E M O R A N D U M**

**TO:** **Marlene H. Dortch, Secretary, FCC**

**FROM:** **Jennifer M. Kashatus**

**DATE:** **October 18,2002**

**RE:** **Comments of ITC^DeltaCom Communications, Inc. d/b/a ITC^DeltaCom and Business Telecom, Inc. In Opposition to US LEC Corp.'s Petition, CC Docket No. 01-92**

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Attached please find an original and four (4) copies of the above referenced case.

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**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, D.C. 20554**

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|---|---|---|
| Petition of US LEC Corp. for a Declaratory Ruling Regarding LEC Access Charges for CMRS Traffic | ) ) ) ) | CC Docket No. 01-92 |

**COMMENTS OF ITC^DELTACOM COMMUNICATIONS, INC. d/b/a ITC^DeltaCom AND BUSINESS TELECOM, INC. IN OPPOSITION TO US LEC CORP.'S PETITION**

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October 18,2002

## SUMMARY

The Commission should deny US LEC's petition, and, instead, address the issues raised therein in the context of the ***LEC/CMRS Intercarrier Compensation Proceeding.*** US LEC has posited what appears to be a generic legal question: whether local exchange carriers ("LECs") can impose access charges on interexchange carriers ("IXCs") for the wireless traffic that transits the LEC's network. US LEC, however, has not disclosed material facts necessary to resolving this inquiry. US LEC has devised a scheme whereby it positions itself between the wireless carrier and the incumbent local exchange carrier ("ILEC"); US LEC receives traffic from the wireless carrier (generally toll free traffic), sends the traffic to the ILEC, which then sends the traffic to the IXC. For routing the call from the wireless carrier to the ILEC, US LEC charges the IXC originating access, even though US LEC did not originate the call. Moreover, US LEC has failed to disclose that it strips ANI and CPN information from the calls in an effort to deceive the IXC **as** to the wireless origination of the calls.

IXCs have incurred substantial additional expense – in the form of access charges – as a result of US LEC's scheme. IXCs not only incur a separate ILEC tandem fee, but also incur US LEC-billed access charges. IXCs would not incur these additional charges absent US LEC's involvement. In reality, what US LEC seeks is a Commission decision that it can use to validate its own conduct, which is not representative of competitive local exchange carriers ("CLECs") as a whole.

Contrary to US LEC's position, the Commission has not addressed the specific issues raised in **US** LEC's petition. Certainly the Commission has not contemplated that a carrier would impose access charges in the manner in which **US** LEC has done. Additionally, the Commission already has concluded that CMRS providers cannot collect access charges from

IXCs absent a contract. US LEC is not a CMRS provider. Nor can US LEC claim that these wireless calls actually originated on US LEC's local network such that it can assess originating switched access charges.

Although the Joint Commenters request that the Commission deny US LEC's petition, they are not advocating a position on whether access charges should be permitted on wireless-originated traffic. The Joint Commenters believe that LECs (whether CLECs or ILECs) should be compensated for the legitimate services that the LECs actually perform. In the ***LEC/CMRS Intercurrier Compensation Proceeding,*** the Commission already has sought comment on whether, and to what extent, CMRS providers are entitled to impose access charges on IXCs. Therefore, to ensure that IXCs are not overbilled or double-billed for access charges, while at the same time ensuring that CMRS providers and LECs are duly compensated **for** the legitimate services that they perform, the Commission should address the issues raised in US LEC's petition in the context of the ***LEC/CMRS Intercarrier Compensation Proceeding.***

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**d/b/a ITC^DeltaCom AND BUSINESS TELECOM, INC.**
**IN OPPOSITION TO US LEC CORP.'S PETITION**

ITC DeltaCom Communications, Inc. d/b/a ITC^DeltaCom ("ITC^DeltaCom") and Business Telecom, Inc. ("BTI") (collectively, "Joint Commenters"), through the undersigned counsel, submit these comments in opposition to US LEC Corp.'s ("US LEC") petition seeking a declaratory ruling regarding a competitive local exchange carrier's ("CLEC") ability to impose access charges on traffic originated by commercial mobile radio service ("CMRS") providers.' Both BTI and ITC^DeltaCom provide local and long distance services, including toll free services (*e.g.*, 800, 888), throughout the southeastern United States. Since these carriers have both CLEC and interexchange carrier ("IXC") operations, they are uniquely situated ***to*** respond to the issues raised by US LEC's petition.

I *See Comment Sought on Petitions for Declaratory Ruling Regarding Intercarrier Compensation for* ***Wireless*** *Traffic,* Public Notice, CC Docket No. 01-92, DA 02-2436 (Sept. 30,2002) *("Public Notice").* In the *Public Notice*, the Commission also sought comment on a joint petition filed by several CMRS providers, which requested that the Commission "reaffirm that wireless termination tariffs are not a proper mechanism for establishing reciprocal compensation arrangements" between LECs and CMRS providers. *Id.* The Joint Commenters limit their comments to the US LEC petition.

## I. US LEC HAS FAILED TO DISCLOSE MATERIAL INFORMATION THAT IS RELEVANT TO RESOLVING THE ISSUES RAISED IN ITS PETITION

US LEC has not provided the Commission with an adequate factual background upon which the Commission can fully evaluate US LEC's petition. In its petition, US LEC posits what appears to be a generic legal question: whether CLECs may impose access charges on IXCs for CMRS traffic that transits US LEC's network. Under this seemingly simple predicate, US LEC is in fact requesting that the Commission make a sweeping legal conclusion that would validate US LEC's unlawful conduct. The conclusion that US LEC seeks, however, is inapplicable to the specific factual circumstances in which US LEC – but not all CLECs – has assessed access charges for wireless-originated traffic on IXCs.

### A. US LEC Has Implemented A Scheme For the Sole Purpose of Generating Access Charges

**US** LEC is engaging in deceptive behavior in an effort to defraud IXCs into remitting access charges to it for CMRS-originated traffic. In a typical calling situation, to reach an IXC's subscriber, the calling party originates the telephone call by dialing the ten digit telephone number. When the calling party is served by a wireless carrier, the wireless carrier frequently hands-off the call to the incumbent local exchange carrier ("ILEC"), which then transports the call to the IXC. The ILEC generally charges the IXC a modest tandem fee for performing this service. Importantly, it does not subject this call to access charges applicable to ILEC-originated wireline calls.

US LEC has implemented an alternative scheme whereby it has inserted itself between the wireless carrier and the IXC by having the wireless carrier transmit the call to US LEC.[2] US LEC then sends the call to the ILEC, which then sends the call to ITC^DeltaCom, as

2 It appears that US LEC has implemented this routing scheme predominantly for toll free traffic originating from a wireless customer.

the IXC, for termination. In contrast to the modest tandem fee that the ILEC charges, US LEC imposes originating access charges on the IXC, which are substantially higher than the tandem fee, merely for routing the call from the wireless carrier to the ILEC.[3] Thus, US LEC generates a significant revenue stream in the form of access charges. This arrangement is a classic arbitrage scheme designed to allow the billing of illegitimate access charges by concealing the true jurisdictional identity of the calls.

**As** discussed below, US LEC's scheme has significant consequences for IXCs. IXCs have incurred, and will continue to incur, substantial additional expenses in the form of access charges. US LEC imposes an originating access charge on wireless-originated traffic that it sends to the IXC (often via an ILEC), which is substantially greater than the modest tandem fee that the ILEC imposes.[4] IXCs are subject to "double billing" for routing the same call. In ITC^DeltaCom's experience, US LEC imposes originating access charges on the wireless-originated calls that it has sent to ITC^DeltaCom (via the ILEC). The ILEC, in this case BellSouth, also charges ITC^DeltaCom a tandem fee for switching the call. It appears that the functions that BellSouth performs in routing the call to ITC^DeltaCom do not vary based on whether US LEC is involved in the call routing process.[5] **As** a result, the charges that BellSouth imposes, if any, appear to be based on the functions that BellSouth performs. Thus, when US LEC routes a wireless-originated call through BellSouth, ITC^DeltaCom is charged originating

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3 Though beyond the scope of this proceeding, the Joint Commenters submit that US LEC is violating the terms of its tariff, which permit US LEC to impose access charges only for those calls originated by (or terminated to) US LEC's own end users. ***See*** US LEC Corp., Tariff F.C.C. No. 1, Access Services. This conclusion merely underscores the inappropriateness of using a declaratory ruling to address the situation that US LEC presents.

4 See ***infra*** III.B. (stating that the Joint Commenters are not opposed to paying some compensation to LECs for the legitimate services that they actually perform).

5 This is not to suggest that all calls are routed in the same manner. For example, not all calls transit BellSouth's tandem switch. The manner in which BellSouth handles the call, however, does not depend upon whether US LEC is involved in the call scenario.

access by US LEC and a tandem fee by BellSouth; if US LEC were not in the equation, ITC^DeltaCom would incur solely the BellSouth fee.

### B. US LEC Strips ANI and CPN Information from Wireless-Originated Traffic

As part of US LEC's scheme described above, in ITC^DeltaCom's experience, US LEC takes affirmative steps to obscure the fact that the call originated from a wireless carrier. Specifically, upon receipt of the wireless-originated traffic, US LEC strips the automatic number identification ("ANI") and calling party number ("CPN") information to deceive ITC^DeltaCom as to the wireless origination of the calls.[6] **US** LEC then makes the calls appear as if they were made by US LEC's landline customers, and US LEC delivers the calls to the ILEC who in turn hands off the call to ITC^DeltaCom as the IXC for termination.[7] ANI information enables the IXC to determine the carrier responsible for originating the call (*e.g.,* whether the call originated from a wireless camer, CLEC, or ILEC). The Joint Commenters are not requesting that the Commission address this aspect of US LEC's unlawful conduct. Instead, the Joint Commenters provide this information to the Commission to demonstrate that there are additional facts that may be relevant to the Commission's determination, and that US LEC's

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6 ANI identifies the calling party's billing number. ANI capability enables the carrier to identify the originating number of a call, which when combined with the called number, reveals the jurisdictional nature of the call. ***See, e.g., Determination of Interstate and Intrastate Usage of Feature Group A and Feature Group B Access Service,*** 4 FCC Rcd 1966, 1977 n.7 (1989); ***Rules and Policies Regarding Calling Number Identification Service – Caller ID,*** 9 FCC Rcd 1764, 1765 n.6 (1994); ***see also*** 47 C.F.R. § 64.1600(b) (defining ANI as "the delivery of the calling party's billing number by a local exchange carrier to any interconnecting camer for billing or routing purposes, and to the subsequent delivery of such number to end users."). Calling Party Number ("CPN') "refers to the subscriber line number or the directory number contained in the calling party number parameter of the call set-up message associated with an interstate call on a Signaling System 7 network." 47 C.F.R. § 64.1600(c).

7 In ITC^DeltaCom's experience, US LEC populates the ANI field with telephone numbers that have disconnect recordings. ITC^DeltaCom was informed that these numbers were actually associated with wireless traffic.

method of imposing access charges may not be representative of the CLEC community as a whole.

### C. The Commission Can Address the Generic Issue Raised in US LEC's Petition in the Context of Other Proceedings

**As** illustrated above, US LEC's petition is not what it appears to be; US LEC is asking for a ruling so as to justify its unlawful conduct. The Commission should decline to grant the relief US LEC seeks. The Joint Commenters are not opposed to compensating LECs, whether CLECs or ILECs, for the legitimate services that they perform.

In evaluating US LEC's petition, the Commission must consider the overall access charge compensation scheme. The issues raised in US LEC's petition are intertwined with ongoing Commission proceedings. In the *LEC/CMRS Intercarrier Compensation Proceeding*, the Commission has sought comment on whether, and to what extent, access charges should apply to CMRS providers, and whether CMRS providers are entitled to impose access charges for the traffic terminating on their networks.' The circumstances in which LECs may impose access charges on IXCs for wireless traffic that transits a LEC's network, as well as the type and amount of such charges, clearly is related to whether and to what extent CMRS carriers can impose access charges on IXCs for wireless-originated traffic. When traffic travels from a wireless carrier **through** a LEC to an IXC (and vice versa) each entity performs distinct functions, some of which are compensable. The Commission must ensure, however, that each carrier charges only for the legitimate services that it actually renders. Therefore, to prevent both the CMRS provider and the LEC from charging, for example, originating access on the IXC,

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8 *Developing a Unified Intercarrier Compensation Regime, Notice of Proposed Rulemaking*, CC Docket *No.* 01-92, FCC 01-132, 16 FCC Rcd 9610, 9644, ¶ 94 (2001) ("*LEC/CMRS Intercarrier Compensation NPRM*").

when only one carrier originated the call, the Commission should address these issues in one proceeding.

Furthermore, the Commission also has sought comment on the treatment of access charges with regard to toll free numbers.' Since the vast majority of the calls for which US LEC has billed ITC^DeltaCom are toll free calls (*e.g.,* 800 or 888), the Commission's resolution of the treatment of access charges for toll free traffic is related to the issues raised in US LEC's petition.

## II. THE COMMISSION HAS NOT ADDRESSED WHETHER CLEC ACCESS CHARGES APPLY IN THIS CONTEXT

US LEC takes the position that the Commission already has determined that CLECs are permitted to impose access charges on wireless-originated traffic." To support its position, US LEC principally relies on comments filed by ILECs in various proceedings stating that those carriers charge (or should be able to charge) access charges in particular scenarios, but is unable to cite to **any** precedent that specifically supports its argument. US LEC is incorrect; the Commission has not addressed whether CLECs or LECs may impose access charges in the factual scenario raised in US LEC's petition.

The scant precedent on which US LEC relies suggests that US LEC cannot charge access charges in the calling scenario it employs. In *Texcom v. Bell Atlantic,* the Commission concluded that "LECs cannot assess charges on IXCs for the facilities used to connect the CMRS

9 *See Access Charge Reform, Reform of Access Charges Imposed by Competitive Local Exchange Curriers, Seventh Report and Order and Further Notice of Proposed Rulemaking*, CC Docket No. 96-262, 16 FCC Rcd 9923,9927 n.17 (2001) (stating that the Commission has sought comment on whether "it should treat CLEC originating 'open end' minutes, such as originating access for 800 service, as terminating minutes for access charge purposes.").

10 *See, e.g.,* US LEC Petition at 5-6.

provider's network to that of the LEC because those facilities are not common lines for the purpose of the access charge rules."" Since US LEC is performing limited, if any, functions in transiting the calls, it appears that US LEC is attempting to recover the costs of the interconnection facilities associated with transiting the traffic between the CMRS provider and US LEC, which the Commission has concluded is unlawful.[12]

Moreover, US LEC has charged ITC^DeltaCom for originating access even though US LEC's end users did not originate the calls. The Commission specifically has stated that the originating carrier is the carrier with whom the traffic begins, and that this carrier is distinct from the intermediate carrier, which delivers the call to the terminating carrier.[13] In this case, there is no question that US LEC is not the originating carrier.

US LEC cannot unilaterally impose access charges. The Joint Commenters submit, however, that CLECs may be entitled to a reasonable charge for the legitimate functions that they actually perform, but that this issue is best decided in the *LEC/CMRS Intercarrier Compensation Proceeding.*

**A. US LEC Cannot Unilaterally Impose Access Charges on IXCs**

In the *Sprint PCS Declaratory Ruling*, the Commission concluded that CMRS carriers cannot collect access charges from IXCs for the use of a PCS network absent a contract.[14] In that case, Sprint PCS, a CMRS provider, had sought compensation from an IXC

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11 *Texcom, Inc. d/b/a Answer Indiana v. Bell Atlantic Corp.. d/b/a Verizon Communications,* Memorandum Opinion and Order, 16 FCC Rcd 21493, 21497, 112 (2001).

12 *Id.*

13 *Id.* at 21496, ¶ 9.

14 *See Petitions of Sprint PCS and AT&T Corp. for Declaratory Ruling Regarding CMRS Access Charges*, Declaratory Ruling, WT Docket No. 01-316, FCC 02-203, ¶ 9 (July 3, 2002) *("Sprint PCS Declaratory Ruling")* ("We find that there is no Commission rule that enables Sprint PCS unilaterally to impose access charges on AT&T.").

(AT&T) for the costs of terminating interexchange traffic bound for Sprint PCS's CMRS customers.[15] In reaching its conclusion, the Commission stated that "a carrier seeking to impose charges on another carrier can establish a duty to pay such charges: pursuant to (1) Commission rule; (2) tariff; or (3) contract."[16] Since CMRS services are subject to mandatory detariffing and there is no Commission rule in place authorizing such access charges, absent a contractual obligation to remit payment, AT&T was not required to pay access charges to Sprint PCS.[17]

US LEC is not a CMRS provider. The calls at issue originated with a CMRS provider not US LEC. US LEC, as a CLEC, has an access tariff that states that US LEC will charge IXCs switched access for those calls that originate or terminate to US LEC's local customers.[18]

Based on the Commission's ***Sprint PCS Declaratory Ruling,*** the CMRS provider would need to demonstrate that a tariff, Commission rule, or contract permitted it to assess the charge. ITC^DeltaCom does not have any agreement or contract with a wireless carrier that requires payment for access charges for calls that originate from a CMRS provider.

US LEC has attempted to collect access charges for calls for which the CMRS provider otherwise could not collect. The Commission did not intend for CLECs, such as US LEC, to circumvent its policies by the simple expedient of having the wireless carrier use a CLEC as a faux transit carrier. Since CMRS providers cannot unilaterally impose access charges on IXCs, US LEC similarly cannot unilaterally impose originating access charges – as if the calls

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15 *Id.* ¶ 2.

16 *Id.* ¶ 8. The Commission currently is evaluating whether – and in what context – CMRS providers may impose access charges on IXCs. ***See LEC/CRMS Intercarrier Compensation NPRM,*** 16 FCC Rcd at 9610.

17 ***Sprint PCS Declaratory Ruling*** ¶¶ 9-11.

18 ***See supra*** note ***3***.

at issue originated from US LEC's own customers – on IXCs for the same wireless-originated calls.[19]

### B. CLEC Access Charges Are Appropriate In Some Situations

The Joint Commenters are not opposed to remitting reasonable compensation to LECs – whether ILECs or CLECs – for legitimate costs. The Joint Commenters submit that the costs should be related to the legitimate services that the LEC actually performs.[20] In the access charge context, the Commission has recognized that, regardless of the terminology used by ILECs or CLECs, the provision of access service involves three separate elements: (1) common line, *(2)* local switching, and *(3)* transport." There is no question that CLECs are authorized to impose access charges on traffic originated by – or terminated to – their ***end user*** customers, as long as the aggregate charge of the elements remains within a prescribed benchmark.[22] Moreover, a wireless carrier's choice of transit carrier should not affect the rates that the IXC

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19 The Joint Commenters note, as an aside, that if US LEC truly believed it was entitled to bill IXCs originating and terminating access charges for wireless-originated calls, US LEC would not have had any reason to strip **ANI** and CPN information from the calls or to make it appear **as** if the calls originated from US LEC customers.

20 ***See, e.g., AT&T Corporation, MCI Telecommunications Corporation, et al., v. Bell Atlantic – Pennsylvania, et al.,*** Memorandum Opinion and Order, 14 FCC Rcd 556, 572, ¶ 32 (1998) (stating that, in the context of WATS lines, carriers could recover "the costs of switching and transport functions ***actually performed")*** (emphasis added).

21 CLECs may refer to these elements using different terms, but essentially, seek compensation for the same type of elements. ***Access Charge Reform, Reform of Access Charges Imposed by Competitive Local Exchange Carriers,*** Seventh Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 9923, 9946, ¶ 55 (2001) (stating that there are "certain basic services that make up interstate switched access service offered by most carriers" and that "switched access service typically entails: (1) a connection between the caller and the local switch, *(2)* a connection between the LEC switch and the serving wire center (often referred to as 'interoffice transport'), and (3) company's point of presence.").

22 ***Id.***

pays the transit carrier for access charges. The IXC does not have any control over the transit carrier that the wireless carrier selects.[23]

It appears that US LEC charges IXCs for functions that it did not perform or for functions that were performed unnecessarily for the purpose of generating unlawful access charges. In the call scenario at issue, the wireless carrier's end user originates the call; the wireless carrier sends the call to US LEC, which then sends the call to the ILEC. The ILEC then sends the call to the IXC for termination. In this particular calling scenario, in transporting the call from the wireless carrier to the ILEC, US LEC does not provide either the common line (loop) or switching functions, two of the three primary access functions. Even if the ILEC were not involved, and the call traveled directly from the wireless carrier to US LEC to the IXC, US LEC still is not necessarily performing all of the access functions identified above.

In ITC^DeltaCom's experience, despite the limited functions, if any, that US LEC performs, US LEC imposes a per minute access charge set at the Commission's benchmark on all such traffic. US LEC, therefore, is charging ITC^DeltaCom for services other than those that it has provided. In contrast, for performing the same functions, ILECs and other CLECs impose a modest tandem charge. The Commission must ensure that any charges LECs impose for transporting wireless-originated traffic are reasonable, and that they reflect the actual services performed.

### C. LECs Can Enter Into Contractual Arrangements

The Joint Commenters are not opposed to compensating the LEC for the legitimate services that it actually performs in routing wireless-originated traffic to their customers. To this end, the Joint Commenters submit that LECs always have been permitted to

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23 ***See Texcom** v. **Bell Atlantic** Corp.*, 16 FCC Rcd at 21496-97, ¶ 10; ***see also Access Charges,*** Fifth **Report** and Order, 14 FCC Rcd 14221, 14314-15¶ 182 (1999) (discussing access charges and carrier selection in the context **of** 800 and 888 calls).

enter into contractual arrangements with IXCs for the receipt of such compensation. Moreover, as many already have done, CLECs can enter into direct trunking arrangements with IXCs.

## III. CONCLUSION

For the reasons stated above, the Commission should deny US LEC's petition. The Commission should address the global issue raised in US LEC's petition – whether and to what extent LECs can charge access to IXCs for CMRS-originated traffic – in the context **of** the ongoing *LEC/CMRS Intercarrier Compensation Proceeding.*

Respectfully submitted,

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*Counselfor ITC^DeltaCom Communications, Inc. d/b/a ITC^DeltaCom and Business Telecom, Inc.*

October 18,2002

## CERTIFICATE OF SERVICE

I, Alice R. Burruss, hereby certify that on this 18'' day of October, 2002, copies of the foregoing were served by hand on the following:

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